



GERMANY by Charles L. Glenn

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Overview

The essential elements of the German educational system had come into being—and gained worldwide admiration—well before the political unification accomplished in 1871. When Horace Mann, the “Father of the American Public School,” justified a visit to European schools in 1843 it was on the grounds that he was going “to visit Prussia, which among the nations of Europe has long enjoyed the most distinguished reputation for the excellence of its schools.”¹

While “enlightened absolutism” played an important role in the development of schooling in a number of the German states, its vitality owed more to local initiatives, such as those by von Rochow and other noblemen who, by 1790, had established at least 64 schools on their estates. Indeed, popular education became something of a craze; “the *Erziehungsroman*, or novel of education, flourished in this setting. Hundreds of such novels appeared in the last decade of the [18th] century alone, with some, like those of Pestalozzi, directly influencing the course of nineteenth-century schooling.”²

Over the course of the nineteenth century, Prussia and other German states developed universal popular schooling, almost always of a denominational character. This was accomplished with relatively little government regulation, despite several attempts to enact comprehensive legislation.³ “A local community was clearly obliged by the [Prussian] code to establish and maintain a school and to supply it with a teacher. The code left open whether this was to be done by private philanthropy (religious or lay), through community taxes, or at the expense of the noble landowners.” Financial support from the central governments was limited; that from Berlin in 1830 “represented nearly five per cent of the total Prussian expenditure for schooling. There was no Bavarian subsidy whatsoever.”⁴

The fact that almost all schools in these emerging ‘public’ systems of popular education were either Protestant or Catholic limited the demand for a parallel system of nonstate schools.

Through the historical development of education in Germany, public schools became the norm, though in recent years private schools have enjoyed increasing favor. It is true that the *Constitution* avoided adopting the principle [enunciated in] the Weimar *Constitution* (article 143, section 1), that the education of youth should be provided through ‘public institutions.’ Nevertheless it cannot be overlooked that even according to the phrasing of the *Constitution* the public school serves as standard (article 7, section 4) and rule (article 7, section 5).⁵

With the unification completed in 1871, the constituent states retained responsibility for education, and this arrangement continued under the Weimar regime and in a limited form under National Socialism. This arrangement was restored under the post-war *Constitution* of what became the Federal Republic (BRD), but the state governments were abolished in the area under Soviet Occupation which became the German Democratic Republic (DDR), where education became subject to the close regulation and supervision of the central government.⁶

The educational systems of the former DDR have largely been brought into conformity with those of the BRD since reunification in 1990.

Although the primary responsibility to provide schooling rested with local authorities until the post-war period, the states have taken over in recent decades.⁷ Apart from some exceptions in Bavaria, public schools are now state schools and teachers are state civil servants.⁸

The structure of schooling

Under the German federal system, the sixteen states (Länder) have full responsibility for education (articles 30 and 70 of the federal Constitution) (complete text available at www.uni-wuerzburg.de), and each Land has its own legislation, which may differ from others in some significant respects.

Overall coordination on those matters that call for a measure of uniformity is provided, not by the federal government, but by a standing committee of state education ministers (the 'KMK') who have agreed, in the Düsseldorfer Abkommen of 1955 and (replacing it) the Hamburger Abkommen of 1964, to coordinate policies in a number of areas—standards for grading, school vacations, recognition of one-another's examinations—while leaving ultimate authority to each state. These agreements take the form of recommendations to the states with the goal that their systems will be generally comparable.⁹

The federal government has only limited responsibilities, mostly related to planning and support for research.¹⁰ While there is no federal education legislation, however, the federal Constitution provides an important framework for the goals of education: the states are obligated to promote and exemplify both democracy and social obligations (article 28), including in the educational systems that they provide.

The great majority of pupils attend state schools, though the number attending independent schools almost doubled from 290,000 (3.2 percent) in 1970 to 436,600 (6 percent) in 1992. The nonpublic schools are disproportionately at the secondary level: 12 percent of all Gymnasium (university preparatory) students in 1992 were in nonpublic establishments. By contrast, only 1 percent of elementary pupils were in nonpublic schools, in part because of the restrictive interpretation of article 7 section 5 of the Constitution which prevailed until a 1992 decision by the Federal Constitutional Court.¹¹

In a significant gesture toward decentralization of decision-making in this highly-regulated system, most Länder require that each school have a Schulkonferenz or consultative body made up of elected parents, teachers and (as appropriate) pupils. In addition, the teachers form a Lehrerkonferenz which makes decisions about various matters related to instruction.¹²

The legal framework

School law in Germany, Avenarius observes, is overwhelmingly that of the states

(*Landesrecht*), “the laws of what are now 16 states with their specific traditions and conceptions of educational policy. . . . Closer examination, however, shows that all in all [German] school law is amazingly uniform.” The goals of education, the structure of schooling (with some variations), the arrangements for government oversight and the prohibition of tuition for public schools are the same nationwide. In fact, he suggests, this self-coordination by the states has led to a conformity which may prevent a healthy competition for school improvement.¹³

The German *Constitution* does not provide an overall framework for education, which is within the exclusive competence of the *Länder*, but establishes certain principles with which the latter must comply. Article 28 requires that “(1) The constitutional order in the States [Länder] must conform to the principles of the republican, democratic, and social state under the rule of law, within the meaning of this Constitution,” and this sets a standard for education laws adopted by the states.¹⁴

Article 7, the only one devoted to education, provides that:

1. The entire educational system shall be under the supervision of the state [*Land*].
2. The persons entitled to bring up a child shall have the right to decide whether it shall receive religious instruction.
3. Religious instruction shall form part of the ordinary curriculum in public schools, except in secular [*bekenntnisfrei*] schools. Without prejudice to the state’s right of supervision, religious instruction shall be given in accordance with the tenets of the religious communities. No teacher may be obliged against his will to give religious instruction.
4. The right to establish private schools is guaranteed. Private schools, as a substitute [*Ersatz*] for public schools, shall require the approval of the state [*Land*] and shall be subject to the laws of the states. Such approval must be given if private schools are not inferior to the public schools in their educational aims, their facilities and the professional training of their teaching staff, and if segregation of pupils according to the means of the parents is not promoted thereby. Approval must be withheld if the economic and legal position of the teaching staff is not sufficiently ensured.
5. A private elementary school shall be permitted only if the education authority finds that it serves a special pedagogical interest, or if, on the application of persons entitled to bring up children, it is to be established as an inter-denominational [*Gemeinschaftsschule*] or denominational or ideological

school and a public elementary school of this type does not exist in the community [*Gemeinde*]. . . .

Some of these provisions will be discussed below.

More than in most countries (except the United States), education policy in Germany has been shaped by decisions of the Federal Constitutional Court [*Bundesverfassungsgericht*].

In his standard work on education law, Avenarius defines a private school as “a school established and managed by an identified sponsor which provides education and instruction on its own responsibility and which may be freely chosen by parents or pupils. As a result, private schools are increasingly known as ‘free schools’ or ‘schools under free sponsorship’ [*Schule in freier Trägerschaft*].”

Freedom to establish non-state schools

“The right to establish private schools,” according to the Constitution, “is guaranteed” (7.4). Schools that are intended to allow the pupils who attend them to satisfy the compulsory school attendance laws, however, must receive state government approval, whether or not they seek public funding. “Private schools, as a substitute [*Ersatz*] for public schools, require the approval of the state and are subject to the laws of the states.”

As we will see below, there are various quality requirements as conditions for this approval.

The following section establishes a further limitation, applying only to elementary schools.

A private elementary school shall be permitted only if the education authority finds that it serves a special pedagogic interest, or if, on the application of persons entitled to bring up children, it is to be established as an inter-denominational or denominational or ideological school and a public elementary school of this type does not exist in the commune [*Gemeinde*] (7.5).

Some historical explanation is required here. Almost all public elementary schools in Germany were either Protestant or Catholic until the 1930s; secondary Gymnasien, attended by a small proportion of the school-aged population, were not generally denominational. The Weimar Constitution, adopted in 1919, called for

nondenominational ‘community schools’ at the elementary level (*Gemeinschaftsschulen*) based upon coexistence of both forms of Christianity in the staff and curriculum and with religious instruction as part of the curriculum. In fact, however, these were the exception rather than the rule, and parents had the right to choose public schools based upon their religious beliefs or worldview (*Volksschulen ihres Bekenntnisses oder ihrer Weltanschauung*).

After World War II, the Protestant churches largely abandoned any claim to influence the identity of what had been Protestant public schools (though continuing to provide religion classes in state schools), while the number of Catholic public schools declined less absolutely. Public confessional schools became the norm in three predominantly-Catholic *Länder*, North Rhine-Westphalia, Rhineland-Palatinate, and Bavaria, though they are now strongly represented only in the first of these states. Baden and the predominantly-Protestant *Länder* opted for non-confessional schools, while making provision for public funding of non-government confessional schools. The continuing role of religious instruction in public schools (and of religious images in some, as in the crucifix controversy in Bavaria) has no doubt weakened to some extent the demand for nonpublic schools with a religious character.

A distinction is made in this provision of the *Constitution* between schools with a religious or philosophical purpose, which are seen as a self-evident right of parents, and schools with a pedagogical purpose, which must justify their existence to (often skeptical) education officials by convincing them that it would somehow be worthwhile. A proposed school with a particular educational approach might be rejected, for example, because somewhere else there was another school already taking that approach. Officials might conclude that there was nothing new to be learned from allowing another such school.

The Constitutional Court has sought to clarify the terms on which a private school can justify its educational approach. It must offer “a meaningful [*sinnvolle*] alternative to the existing available public and private schools, which will enrich pedagogical experience and be of benefit to the overall development of the educational system.” While the school need not be a completely new departure educationally, it should “stress essentially new accents or combine proven concepts with new initiatives of a special significance.”¹⁵

Religious schools are not required to meet a standard of uniqueness, but merely one of parental demand. But what is a religious school? In the case of the Waldorf schools, for example, there is some disagreement about whether they should be considered religious (because of Rudolf Steiner’s quasi-religious theory of “anthroposophism”) or simply pedagogically distinctive. Decisions by the courts extending recognition to an evangelical (in the American, not the German sense) school based on the Bible and

to a New Age-inspired “Universal Life” school have raised the question whether various worldviews contrary to the public interest could propagate themselves behind the shelter of the language of section 5, article 7 of the Constitution: “if, on the application of persons entitled to bring up children, it is to be established as an inter-denominational or denominational or ideological school.”

Richter argues that there is ample authority to prevent the establishment of the “Saddam Hussein Elementary School” or the “L. Ron Hubbard Elementary School,” through invoking the constitutional provision that approved private schools not be inferior to the public schools in their educational aims. The concept of “educational aims,” he points out, goes beyond skills and knowledge and includes the qualities of character necessary for a democratic society. While acknowledging that “what these educational aims are and how far the State can go” to promote them is an open question, Richter contends that they rest upon the principles of pluralism, freedom, social-mindedness, and participation, and are sufficient to rule out the more extreme sects and to prevent harmful indoctrination of children.¹⁶

Not mentioned in the Constitution but a significant impediment to the establishment of new nonpublic schools is the practice, in some of the *Länder*, of requiring that a school operate for some—typically three— years without a subsidy before it becomes eligible for public funding. This works against the principle that nonpublic schools be equally accessible to families of different incomes, since considerable sacrifices are demanded of parents during the period when a school is first getting off the ground.¹⁷ In general, the Constitutional Court decided that the right to establish a private school included the right to financial subsidies by the state (BVerwG, RdJB 88, 40), but the state need not provide such subsidies from the moment a private school is established, since it has the right to wait and see whether the school will survive and attract sufficient parental interest (BVerwG, RdJB 90, 107, 128).

The procedures for approval of a school have been summarized as follows:

This accreditation must be issued, if the following conditions are met: The teachers’ qualifications must correspond to those of the teachers in public schools; teachers must be assured of an appropriate contract and salary; the pupils cannot be discriminated against because of the financial status of their parents. . . . It is self-evident, that the ethical standards of the federal constitution, i.e. human rights, must be and are valid standards for school education.¹⁸

Homeschooling

Article 6 of the *Constitution* provides that “(1) Marriage and family are under the special protection of the state. (2) Care and upbringing of children are the natural right of the parents and primarily their duty. The state supervises the exercise of the same.” German law, while recognizing this priority of parental responsibility, does not allow for home schooling on the basis of the religious or pedagogical convictions of parents; it is allowed only for medical reasons.¹⁹

There are, however, a certain number of Germans, including some associated with Christian communities, who are educating their children at home, though not without legal difficulties. There will be international conference on home schooling in Berlin in November 2012.

School choice not limited by family income

“Such approval must be given . . . if segregation of pupils according to the means of the parents is not promoted thereby” (*Constitution* 7.4). This provision, intended to prevent the emergence (or re-emergence) of a network of elite schools for the those able to pay tuition, has proved decisive for the question of public subsidy of nonpublic schools. In particular, a decision of the Federal Constitutional Court has placed an obligation upon the states promote the welfare of the alternative nonpublic sector in education.

Initially, the state education officials of post-war Germany agreed among themselves that the language of Section 7 of the *Constitution* guaranteeing the right to non-government schooling did not create an obligation to provide public funding to non-government schools. As early as 1955, however, the argument was made that a right guaranteed by the *Constitution* should be secured by public funding -- especially if independent schools were to be required to be equivalent to state-funded schools.²⁰ In support of this contention, a Federal Administrative Court ruling in 1966 found that the stringent conditions for approval of non-government substitute schools would be impossible to meet without subsidies.

The provision of subsidies did not put the issue to rest, however, since the ruling left it up to the states to determine how best to meet their obligation to make it possible for non-government schooling to survive. The actual practices varied. In some states, non-government schools were reimbursed for their expenditures in certain categories within limits set by the expenditures of public schools; this “involves considerable administrative work and allows the relevant state authorities a great deal of scope for exercising control and influence.” In other states, the amount of public subsidy provided is based upon “the

staff costs for a comparable state school pupil based on the average state school class size . . . the school retains complete freedom as regards the utilization of the aid.”²¹ The variation among states has led to repeated litigation.

In several of the states, government funding is provided to private schools at some proportion of that provided to public schools. Recent litigation has tested whether this support is a matter of discretion or of right. A 1984 case in North Rhine-Westphalia, for example, was decided by the Federal Administrative Court against a private school which claimed that its 85 percent subsidy was arbitrary since the law would have permitted [the subsidy] to be as high as 98 percent in case of financial need. The Court found that there was no constitutional guarantee for any particular private school but only for private education in general.

In contrast to this narrow ruling, the Federal Constitutional Court issued, in April 1987, a ruling based upon the constitutional guarantee that “everyone shall have the right to the free development of his personality” (article 2.1) that went further than ever before in asserting a right to publicly-funded non-government education (complete text of this ruling (BVerG 74, 40) available at www.uni-wuerzburg.de/dfr/bv075040). The case was brought by several state-approved non-government schools in Hamburg that had been receiving a public subsidy at 25 percent of the costs of comparable public schools. The non-government schools pointed out that they were having difficulty surviving with this level of support, and that confessional schools in Hamburg were receiving a 77 percent subsidy. The government responded that “the function of non-government schools consists of the widening and enrichment of the public school system through alternative offerings.” Experience had shown that the greatest demand for such alternatives was for confessional schools on the one hand and for “reform-pedagogical” schools on the other.

The higher support for schools with a distinctive worldview rests in the final analysis on their reliance [upon this support], developed through many years of constant demand. Confessional schools have always played a special role in the German educational system. For this reason, but also as a matter of duty, in order to make up for the closing [by the National Socialist government] of the confessional schools in 1939, Hamburg gave them a high level of support in the years after the War.

The Federal Constitutional Court concluded that Hamburg could not treat the support of non-government schools as a matter of its absolute discretion, so as to make them prosper or decline as seemed best to public officials. The Constitution recognized a right to found non-government schools. The basis for this right was the concern of the Constitution for human dignity, for the unfolding of personality in freedom and self-direction, for freedom of religion and conscience, for the neutrality of the government in relation to religion and worldview, and for respect of the natural rights of parents.

It was not enough, the Court found, for the government simply to allow non-government schools to exist; it must give them the possibility to develop according to their own uniqueness. Without public support, such self-determination would not be possible. Non-government schools could not, at present cost levels, meet the requirements for government approval out of their own resources. To expect them to do so, the court ruled, would inevitably force them to become exclusive schools for the upper classes (Standes- oder Plutokratenschulen). But this was precisely what the Constitution, and the Weimar Constitution before it, was concerned to avoid by the requirement that non-government schools could not lead to economic segregation. Non-government schools must remain accessible for all, not in the sense that they must accept every qualified student, but in the sense that economic circumstances do not function as a barrier to attendance.

Only when [non-government schooling] is fundamentally available to all citizens without regard to their personal financial situations can the [constitutionally] protected educational freedom actually be realized and claimed on an equal basis by all parents and students. . . . This constitutional norm must thus be considered as a mandate to lawmakers to protect and promote private schools.

Despite this ruling, Jach points out, the procedures under which the Länder fund nonpublic schools continue to vary, with support much more adequate in some than in others. The level of support can be as little as 55 percent or as much as 85 percent of the expenditure of equivalent public schools.²² As a result, only confessional schools can in general keep their tuition to a token amount (and many of these serve poor urban areas), while the pedagogically-distinctive schools must typically charge significantly more.

School distinctiveness protected by law and policy

Local municipalities in most cases have no authority over the schools, and the schools themselves have limited autonomy with respect to the program that they follow, despite the frequent invocation of that principle in current reform measures. Teachers are state civil servants and are not selected or appointed by the leadership of the school, and it is the state's inspector, not a school-level administrator, who evaluates the work of new teachers.

The textbooks selected for use in state schools are privately published but must have official approval, which is concerned to ensure that they cover the required content and also that they do not conflict with the principles expressed in the *Constitution*. Choice of which books to use is ordinarily made by the *Lehrerkonferenz* of each school.²³

The proposals for increased autonomy, Jach points out, are mostly confined to diversifying the public systems somewhat, and do not call for measures that would redefine “public” education to include parent-initiated schools. Under the classic German understanding of the structure of education, he writes, the citizen is simply a user of the school-as-establishment, with no say about what or how it teaches; the state, and not the citizen, decides that.²⁴

The same point is made in a more positive way by Avenarius, who stresses that “the state’s responsibility in education does not come behind that of parents, but is on the same level. This includes not only transmitting knowledge, but also has the goal of educating the individual pupil into a responsible member of society.”²⁵

The Constitutional Court has made it clear that anything like a monopoly of schooling on the part of the State would be unconstitutional, and that the philosophically-neutral secular state may not promote a viewpoint through education in the way that private schools may legitimately do so. Indeed the State must guarantee “educational diversity even from itself.”²⁶

Private schools, while they must provide an education equivalent to that in state schools, are not required to do so in a similar way, and are free to choose curriculum materials and teaching methods. Those with a religious character can decide not to provide the state-proscribed sex education.²⁷

Distinctive character

As noted above, a diverse situation emerged after World War II, with five types of schools: public schools with a Catholic character, public schools with a Protestant character, public schools with some other distinctive world-view, non-denominational public schools (eventually the great majority in most of Germany), and non-government (‘free’) schools.

In 1960, 3.2 percent of all pupils in the Federal Republic (‘West Germany’) were in ‘free’ (independent) schools, and this proportion increased to 4.4 percent in 1975, 6 percent in 1985, and 6.1 percent in 1998. The *Länder* of the former German Democratic Republic (‘East Germany’) naturally had very few if any pupils in non-government schools before re-unification, but the number and proportion has grown somewhat, from 0.5 percent in 1992 to 2.6 percent, or 63,000 pupils, in 1998. The proportion of pupils attending ‘free’ schools that year was highest – 8.5 percent – in Bavaria.²⁸

In Berlin, Bremen, Hamburg, Hesse, Schleswig-Holstein, and Lower Saxony (except in Oldenburg) all public schools became non-confessional after the War, while in Bavaria, Rhineland-Palatinate, Baden-Württemberg, and Saarland, the picture was mixed. In Saarland there were only confessional schools; in Bavaria schools were confessional except in a few large cities; in Rhineland-Palatinate two-thirds and in Baden-Württemberg one-fifth of the schools were confessional. Thus, the large majority of Catholic children were in Catholic public schools and an additional number were in publicly-assisted Catholic non-government schools.²⁹

This accommodation of religious convictions began to weaken during the 1960s, not least because the convictions themselves weakened through growing secularization. The resettlement of some 6 million German refugees from the East in the aftermath of World War II confused the centuries-old pattern of religiously-homogeneous communities, as did the growing movement from rural areas to cities. These events – together with the creation of larger schools in the interest of efficiency and a modern curriculum – had the effect of making confessional schools less practical and less in demand.

Protestant leaders came out in formal support of non-confessional schools in 1958, and through the next decade many schools gave up their Protestant identity. The Catholic bishops fought a rear-guard action, but with declining support from parents. Thus, confessional public schools have faded in significance over the past three decades. A referendum in 1968, for example, overwhelmingly approved an amendment to the Bavarian Constitution that made all public elementary schools “Christian” or inter-confessional, with some instruction on a confessional basis. Non-government confessional schools were assured full public funding, and as public schools lost their confessional character, enrollment in private schools expanded.³⁰

Public confessional schools (*Bekenntnisschule*) continue to serve about one-third of the elementary pupils in North Rhine-Westphalia, the largest state. These are operated by local school authorities and subject to essentially the same controls as non-confessional public schools. In several other states, private confessional schools can be accepted into the public system. The confessional identity of the Catholic, and even more of the remaining Protestant, public schools may be limited to their periods of religious instruction. Clerical influence, in particular, is strictly limited. Despite the continuing existence of denominational public schools, then, they have tended to differ little if at all from other public schools.³¹

Most states in Germany now consider their elementary schools either inter-denominational Christian common schools (*christliche Gemeinschaftsschulen*) or common schools without a specifically Christian identity, though with some variations on these choices. The states that consider to identify their schools as Christian are Baden-Württemberg, Bavaria, Rhineland-Palatinate and Saarland.

Berlin, Brandenburg, Hamburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt, Schleswig-Holstein, and Thüringen identify their schools as simply *Gemeinschaftsschulen*. Public schools in Bremen are *Gemeinschaftsschulen* “on a general Christian basis,” those in Hesse “resting on a humanist and Christian tradition,” those in Lower Saxony “on the basis of Christianity, of European Humanism, and of the ideas of liberal, democratic and social freedom movements,” while North Rhine-Westphalia includes in its public system, as noted, confessional schools as well as *Gemeinschaftsschulen* “on the basis of Christian educational and cultural values in openness to Christian beliefs and to other religious and philosophical convictions.”³²

In short, the states have found a variety of ways to describe the character of their schools, often relating this explicitly to German religious traditions.

While the role of state-sponsored confessional schooling has faded in post-war West Germany, that of non-government independent schools, while still numerically insignificant, has grown. While most of these have a religious character (enrolling about 5 percent of all pupils), the more dynamic sector consists of the alternative schools that enroll about 1 percent. It is fair to say that the political and legal efforts in support of educational freedom are borne largely by supporters of pedagogical rather than religious diversity. While religion is generally accommodated within the public system, there is little pedagogical diversity, despite a recent emphasis upon school-level autonomy.³³

In 1997, according to Jach, there were 30 Free Alternative schools in Germany, and 11 initiatives to start such schools. The number had grown from only 14 in 1994, as a result of another decision of the Federal Constitutional Court, in 1992, requiring that section 5 of article 7 be applied less restrictively. During the 1995-96 school year alone, six new schools of this type began operation.

There were 93 Montessori schools in 1990, a number that swelled to 158 in 1995, many of them public schools using the Montessori pedagogy.³⁴

Most schools operated by the Protestant churches are residential secondary schools, as are many of the private Catholic schools operated by religious orders. By contrast, the Waldorf (Steiner) schools include elementary as well as secondary grades.³⁵

Decisions about admitting pupils

School attendance from age six is compulsory. So long as parents do not select a

private school, they must send their children to the primary school established for the area where they live. Choice among secondary schools is more extensive.

Germany, like other countries, has in recent years allowed a greater degree of autonomy to individual schools and has encouraged their staff to develop distinctive educational profiles. A natural consequence is that every school is not appropriate for every pupil. Parents have begun to seek different school placements for their children, and not only in schools that are deliberately specialized with a vocational or other emphasis (*Wahlschulen*), but also in ordinary schools whose pupils are enrolled on the basis of residence. The states have adopted rules governing admission to over-subscribed schools, but these follow no single pattern.

In North Rhine-Westphalia, there is a choice in some areas between public confessional and non-confessional schools. Pupils for whom the district school does not correspond to their denomination may attend out-of-district schools. There is no right for pupils who do not belong to the denomination of the school to attend a confessional school, unless there are no alternative within a reasonable distance.³⁶

Private schools are, in theory, free to admit pupils who, in the school's judgment, are most likely to benefit from their programs. They may not, however, exercise selection in such a way that only children from wealthy families are admitted, since the *Constitution* makes as a condition of the approval of private schools that this does not result in "segregation of pupils according to the means of the parents" (article 7, section 4). States can, if they choose, require private schools that are recognized as equivalent to public schools to employ similar admission procedures.³⁷

Decisions about staff

Teachers in public schools are employed by the *Land* education authorities and assigned to schools, except in Bavaria, where some teachers are employed by cities.³⁸ Religion may not be used as the basis for deciding which teachers to employ, except in the case of public confessional schools. While the latter employ primarily adherents of the denomination with which they are identified, they sometimes employ non-believers who must, however, conform their teaching to the educational project of the school.³⁹

Private schools may select their teachers on whatever basis their sponsors think appropriate, but must employ teachers who meet the same qualifications as those in the public schools.⁴⁰ "Approval," the *Constitution* states, "must be given if private schools are not inferior to the public schools in their educational aims, their facilities

and the professional training of their teaching staff . . . Approval must be withheld if the economic and legal position of the teaching staff is not sufficiently ensured” (7.4). As interpreted, this places two sorts of limits on the freedom of action of subsidized nonpublic in relation to staff decisions. On the one hand, they can appoint only staff with the qualifications to work in public schools. On the other, they must pay these staff comparably to public school staff and grant them the same employment protections as exist in public schools.

German teachers in state schools are civil servants. Most are in the category of *Beamte* under public law, while the legal status of others is protected under the laws that apply to industrial employment, with some specific rules for the public sector.

Accountability for school quality

Public schools are subject to inspection by state officials and must follow a prescribed curriculum; they also serve as the standard by which nonpublic schools are judged to provide a satisfactory level of instruction. This does not require that the educational aims of nonpublic schools be identical with those of the public system; only that they be equivalent in quality.

Once that equivalence has been established, nonpublic schools enjoy considerable freedom to organize instruction as they wish, though the need to prepare secondary students for the *Abitur* creates inevitable constraints. In North Rhine-Westphalia, the certificates and diplomas which nonpublic schools award are automatically equivalent to those of state schools. “In the other Länder the equivalence requires a special recognition (*Anerkennung*) of the private school by a distinct act of the state school authority. This recognition is more than the approval (*Genehmigung*) of the private school according to art. 7 section 4 of the Basic Law. This view is at least the dominant legal opinion supported also by the Federal Constitutional Court (BVerfG 27, 195 [203 f.]). I have to admit, however, that some authors have a different standpoint meaning that ‘approval’ of a private school includes the ‘recognition’ of the school and therefore the automatic equivalence of its certificates and diplomas.”⁴¹

This leaves a great deal up to the judgment of education officials, of course, since no definition is provided. For example, would comparable scores on some standardized test be considered sufficient evidence, or are the officials authorized and required to inquire closely about the “educational aims” of a school based upon a distinctive worldview or set of religious convictions, or an understanding of goals for human

development, that are precisely in conflict with the prevailing ‘orthodoxy’ in education circle. The constitutional right to the free development of personality requires, Jach argues, that the State abstain from defining a single model of maturity which all schools should strive to develop in their pupils. In particular, it should recognize that the goal of individualization does not necessarily point toward the liberal model of the free-standing individual, but may rather require meaningful participation in a community. Simply to proclaim “toleration” as the fundamental principle of public schools does not satisfy the developmental need of children to form secure identities in relationship to such communities. The State is thus obligated to make it possible for young citizens to have a variety of types of schooling, based upon different concepts of the meaning of “development of personality,” and to support independent schools to the extent that public schooling does not include the necessary diversity.⁴²

Having approved private schools on the basis of their equivalence to state schools, the state education authorities have a responsibility to monitor their continued compliance with this standard, including assurance that they are not teaching in ways or with goals in conflict with the *Constitution*. The school inspection can look quite specifically at the details of how private schools examine their pupils in order to ensure this equivalence.⁴³

Teaching of values

As noted above, the federal *Constitution* provides a framework of fundamental obligations with which schools must comply as they carry out their educational mission. The very first provision states that “(1) Human dignity is inviolable. To respect and protect it is the duty of all state authority” (article 1). The next article guarantees to every citizen the right to the “free development of personality” (article 2.1).

Subsequent articles also have implications for how schools operate and for what values they seek to teach:

Article 3. (1) All humans are equal before the law. (2) Men and women are equal. The state supports the effective realization of equality of women and men and works towards abolishing present disadvantages. (3) No one may be disadvantaged or favored because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions. No one may be disadvantaged because of his handicap.

Article 4 (1) Freedom of creed, of conscience, and freedom to profess a religious or non-religious faith are inviolable. (2) The undisturbed practice of religion is guaranteed.

Article 5 (1) Everyone has the right to freely express and disseminate his opinion in speech, writing, and pictures and to freely inform himself from generally accessible sources. . . . (3) Art and science, research and teaching are free. The freedom of teaching does not release from allegiance to the constitution.

And, as noted above, article 28 requires that “(1) The constitutional order in the States [Länder] must conform to the principles of the republican, democratic, and social state under the rule of law, within the meaning of this Constitution,”

Each of the states has its own constitution, with provisions about education, setting out the goals that schools must seek to achieve, and legislation specifying further the content of instruction.⁴⁴ “Baden-Württemberg, for example, sets the following ‘educational goals’: respect for God, Christian charity, brotherhood of mankind, love of peace and homeland, ethnical and political responsibility, professional and social reliability, liberal. Democratic convictions, tolerance and social ethics.”⁴⁵

The educational objectives of the states were articulated in a 1973 agreement of the state education ministers (KMK), as follows:

- to transmit knowledge, readiness, and skills
- to enable [pupils to develop] independent critical judgment, responsible action and creative activity
- to educate for freedom and democracy
- to educate for tolerance, respect for the dignity of others and for other convictions
- to awaken a peaceful attitude in the spirit of understanding among peoples
- to ensure understanding of ethical norms as well as cultural and religious values
- to awaken a readiness for social action and political responsibility
- to enable acceptance of rights and duties in the society
- to provide orientation to the demands of the world of work.⁴⁶

How far the state can go in determining the character-shaping goals of education is a matter of considerable debate. Avenarius points out that schools are required to prepare pupils to live in a democratic society, and thus must be characterized by tolerance and openness; schools and teachers have a legal obligation to make this a central educational goal, but it is left up to them how they will seek to meet this obligation, nor are they expected to produce conformists. It is rather the responsibility of the school to teach their pupils how to be tolerant and to handle disagreements. The state may not operate a “missionary school” for any particular worldview.

German education seeks explicitly (through religious instruction and in other ways) to teach values associated with the Christian tradition, without making acceptance of Christian beliefs a goal. Religious instruction is a required subject in most of the states,⁴⁷ and must not be given a marginal position within the instructional program of a school. This instruction is provided on a denominational basis, in accordance with programs established by Catholic and Protestant authorities. It may not, the Constitutional Court has found, simply be an ecumenical overview, nor comparative religion, “nor simply moral teaching, ethical instruction, historicizing and relativizing religious knowledge, history of religion or biblical history. Its concern is much more with the content of belief, that is the religious convictions of the contemporary religious community. To transmit these as enduring truths is its responsibility.”⁴⁸

There has been much discussion about how to provide Islamic religious instruction, given the lack of a hierarchical structure for Islam in Germany. While some fear that such classes would provide occasions for teaching attitudes toward the roles of men and women and other viewpoints contrary to the norms of a democratic society, there are others who insist that Islamic instruction under the aegis of the public schools is preferable to the ‘Koran schools’ to which many Turkish and other immigrant pupils are sent after school.⁴⁹ A decision of the Bundesverwaltungsgericht in February 2000 sustained a lower court decision that public schools in Berlin could be required to provide Islamic religious instruction.

Participation in religious instruction is voluntary, but a number of states require that pupils who ask to be excused from religious instruction take part in a secular ethics class instead. The claim that this requirement violates the conscience of students was rejected by the Federal Administrative Court in a 1998 decision which found that, under their general authority to supervise education (article 7, section 1 of the *Constitution*), the states could require such instruction. It must, however, be religiously and philosophically neutral, which did not exclude consideration of the ways in which the Christian faith had shaped culture and education.⁵⁰

In more general terms, “state neutrality based upon the constitutional right of both positive and negative religious freedom does not constitute a claim to be spared, in school, from confrontation with the content of Christian beliefs.”⁵¹

Endnotes

- ¹ Schleunes, 3; for an overview, see Tenorth; this influence in the United States is discussed in Glenn (1988).
- ² Schleunes, 9, 26-28; see the account in Schmale, 627-734.
- ³ Avenarius and Heckel, 13.
- ⁴ Schleunes, 110.
- ⁵ Avenarius and Heckel, 37.
- ⁶ Avenarius and Heckel, 15; see the account of education in the DDR in Glenn (1995), 267-311; Glenn (2011), 166-75.
- ⁷ a rich selection of documents from this period is found in Anweiler, Fuchs, Dorner and Petermann, 1992.
- ⁸ Avenarius and Heckel, 159.
- ⁹ Avenarius and Heckel, 21, 11.
- ¹⁰ Füssel, 268.
- ¹¹ Jach 1999, 268-69.
- ¹² Avenarius and Heckel, 125-131.
- ¹³ Avenarius and Heckel, v, 22-23.
- ¹⁴ Avenarius and Heckel, 19.
- ¹⁵ BVerfG 88, 40 (53, 59), quoted by Avenarius and Heckel, 213.
- ¹⁶ Richter, 1162-63; in support of this position, Avenarius and Heckel, 214.
- ¹⁷ Jach 1999, 279-80.
- ¹⁸ Lambert, 260.

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- ¹⁹ Avenarius and Heckel, 459.
- ²⁰ Hans Heckel, quoted by Vogel 1972, 38.
- ²¹ Weiss and Mattern, 58.
- ²² Jach 1999, 275-78.
- ²³ Avenarius and Heckel, 67-68.
- ²⁴ Jach 1999, 266-7.
- ²⁵ Avenarius and Heckel, 62.
- ²⁶ Avenarius and Heckel, 198.
- ²⁷ Avenarius and Heckel, 209-10.
- ²⁸ Vogel 2000, 3-4.
- ²⁹ Spotts, 219.
- ³⁰ Spotts, 228; Avenarius and Heckel, 199
- ³¹ Ramm, 48.
- ³² Avenarius and Heckel, 103-5.
- ³³ Jach 1999, 256.
- ³⁴ Jach 1999, 267.
- ³⁵ Avenarius and Heckel, 200-2.
- ³⁶ Avenarius and Heckel, 479-83.
- ³⁷ Avenarius and Heckel, 206.
- ³⁸ Lambert, 262.
- ³⁹ Avenarius and Heckel, 106, 304-5.

⁴⁰ Avenarius and Heckel, 205.

⁴¹ Avenarius and Heckel, 215; email from Avenarius August 2001.

⁴² Jach 1991, 64-5, 81.

⁴³ Avenarius and Heckel, citing BVerG 27, 195, 206.

⁴⁴ Avenarius and Heckel, 241.

⁴⁵ Lambert, 261.

⁴⁶ quoted by Avenarius and Heckel, 65.

⁴⁷ Bremen, for historical reasons, is the only official exception to the requirement, though Brandenburg in the former DDR has created a substitute entitled “Life-formation, ethics, and religious knowledge.” See Avenarius and Heckel, 70-1.

⁴⁸ BVerGE 74, 244 (252), quoted by Avenarius and Heckel, 72; see also 530-1.

⁴⁹ Avenarius and Heckel, 98-99, 215; Elsas, 66-92; Thoma-Venske, 86.

⁵⁰ BVerwG, DÖV 1998, 1058, summarized in Avenarius and Heckel, 74.

⁵¹ Avenarius and Heckel, 65-7.

References

Oskar Anweiler, Hans-Jürgen Fuchs, Martina Dorner and Eberhard Petermann, editors, *Bildungspolitik in Deutschland 1945-1990: Ein historisch-vergleichender Quellenband*, Leske & Budrich, 1992.

Hermann Avenarius and Hans Heckel, *Schulrechtskunde*, 7th edition, Kriftel: Luchterhand, 2000.

Bundesverfassungsgericht, *In den Verfahren zur verfassungsrechtlichen Prüfung der . . . Privatschulgesetzes der Freien und Hansestadt Hamburg*, April 8, 1987, 12.

John E. Coons, "Educational Choice and the Courts: U.S. and Germany," *The American Journal of Comparative Law*, 24, 1, Winter, 1986.

Christoph Elsas, "Religiöse Faktoren für Identität: Politische Implikationen Christlich-Islamischer Gespräche in Berlin," in *Identität: Veränderungen kultureller Eigenarten im Zusammenleben von Türken und Deutschen*,. Hamburg: Rissen, 1983.

Hans-Peter Füssel, "The Attribution of Powers as to Education within Germany," in *Subsidiarity and Education: Aspects of Comparative Educational Law*, edited by Jan De Groof, Leuven (Belgium): Acco, 1994.

-----, "Developments in Educational Legislation in Germany: Between Unification and Autonomy," *European Journal for Education Law and Policy*, 1, 1997, 131-34.

-----, "Developments in Educational Legislation in Germany: The Program of the School - A New Word in German School Legislation," *European Journal for Education Law and Policy*, 2, 1998a, 77-78.

-----, "Freedom in the German School System," *European Journal for Education Law and Policy*, 2, 1998b, 139-40.

-----, "Religious Instruction for Islamic Pupils - a German Discussion," *European Journal for Education Law and Policy*, 3, 1999, 139-40.

-----, "Autonomy of the Educational Institutions," in *Autonomy in Education*, edited by W. Berka, J. De Groof and H. Penneman, Kluwer, 2000, 357-63.

----- and Güntner Püttner, "The Position of Minorities in Education in Germany," in *The Legal Status of Minorities in Education*, Acco, 1996.

----- and -----, "The Legal Status of Teachers in Germany," *The Legal Status of Teachers in Europe*, edited by J. De Groof, Acco, 1998.

-----, ----- and Ingo Richter, "The Legal Status of Pupils in German Schools," in *The Legal Status of Pupils in Europe*, edited by J. De Groof and H. Penneman, Kluwer, 1998.

Charles L. Glenn, *The Myth of the Common School*, Amherst: University of Massachusetts Press, 1988.

-----, "Germany," in *Choice of Schools in Six Nations*, Washington, DC: U.S. Department of Education, 1989.

-----, "Eastern Germany," in *Educational Freedom in Eastern Europe*, Washington, DC: Cato Institute, 1995.

-----, *Contrasting Models of State and School: A Comparative Historical Study of Parental Choice and State Control*, New York and London: Continuum, 2011.

Frank-Rüdiger Jach, *Schulvielfalt als Verfassungsgebot*, Berlin: Dunker & Humblot 1991.

-----, *Schulverfassung und Bürgergesellschaft in Europa*, Berlin: Duncker & Humblot, 1999.

Johannes Lambert, "School Legislation in Germany," in *Subsidiarity and Education: Aspects of Comparative Educational Law*, edited by Jan De Groof, Leuven (Belgium): Acco, 1994.

Thilo Ramm, "Die Bildungsverfassungen," *Vergleich von Bildung und Erziehung in der Bundesrepublik Deutschland und in der Deutschen Demokratischen Republik*, edited by Oskar Anweiler and others, Cologne: Verlag Wissenschaft und Politik 1990.

Ingo Richter, "Privatschulfreiheit für die Grundschulen von Sekten?" in *Neue Zeitschrift für Verwaltungsrecht* 12, 1162-1164, 1992.

Karl A. Schleunes, *Schooling and Society: The Politics of Education in Prussia and Bavaria 1750--1900*, Oxford, New York, Munich: Berg 1989.

Wolfgang Schmale, "Die Schule in Deutschland im 18. und frühen 19. Jh.," in *Revolution des Wissens: Europa und seine Schulen im Zeitalter der Aufklärung (1750-1825)*, edited by Schmale and Nan L. Dodde, Bochum: Verlag Dr. Dieter Winkler, 1991.

Frederic Spotts, *The Churches and Politics in Germany*, Middletown, CN: Wesleyan University Press 1973.

Heinz-Elmar Tenorth, *Geschichte der Erziehung*, 3rd edition, Weinheim and Munich: Juventa, 2000.

Hans Thoma-Venske, "The Religious Life of Muslims in Berlin," in Tomas Gerholm and Yngve Georg Lithman, editors, *The New Islamic Presence in Western Europe*, London: Mansell, 1988.

Johann Peter Vogel, "Bildungspolitische Perspektiven," *Freie Schule II. Öffentliche Verantwortung und freie Initiative*, Stuttgart: Arbeitsgemeinschaft Freier Schulen 1972.

-----, "Zahlen freie Schulen 1998," *Recht und Schule* 3/00, September 2000.

Manfred Weiss and Cornelia Mattern, "The Situation and Development of the Private School System in Germany," in *Social Change and Educational Planning in West Germany*, edited by Hasso von Recum and Manfred Weiss, Frankfurt am Main: Deutsches Institut für internationale Pädagogische Forschung, 1991.